United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL 75-7403

IN THE

United States Court of Appeals

For the Second Circuit.

LEROY PORSS,

Plaintiff-Appellee,

-against-

MARITIME OVERSEAS CORPORATION,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York

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BRIEF OF DEFENDANT-APPELLANT, MARITIME OVERSEAS CORPORATION

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DEFENDANT-APPELLANT'S BRIEF

PRELIMINARY STATEMENT

Defendant appeals from the judgment entered in the United States District Court for the Southern District of New York, May 28, 1975, in favor of the plaintiff in the amount of $25,000. This is a seaman's personal injury action brought pursuant to 33 U.S.C. 688 *et. seq.* (The Jones Act) by a former member of the crew of defendant's vessel S/S OVERSEAS ALEUTIAN to recover damages for personal injuries said to have been sustained aboard ship on June 8, 1971. This case was tried between April 7 and April 16, 1975, before the Hon. Richard H. Levet. Defendant appeals on the ground that the jury verdict was based on insufficient evidence and/or was against the clear weight of evidence and was based on testimony that was false and/or incompetent and was the result of the misconduct of the

attorney for plaintiff resulting in mistake or passion, and/or the product of errors and omission in admission and exclusion of evidence. Defendant also appeals on the basis that the jury's verdict for past lost wages vastly exceeded the proof.

ISSUE PRESENTED

At issue is the propriety of the denial by the court below of defendant's motion for judgment n.o.v. or for a new trial. But the basic question is the viability of this judgment obtained solely through the uncorroborated testimony of an, at best, barely credible plaintiff where the great preponderance of the evidence as to the happening of an accident tends to support the contrary conclusion that the event alleged never occurred, and particularly, when through distressingly aggressive misconduct, the attorney for plaintiff successfully sought to confuse the proof and distract the jury from the merits of the case.

THE TRIAL TESTIMONY

Plaintiff, at the time of his alleged accident, a 42 or 43 year old American seaman (a naturalized citizen (24) having been born in Estonia (25)) testified that he sustained a back injury on June 8, 1971 (33) at approximately 9:20 or 9:30 a.m. (201) while engaged in the last stages of butterworthing the vessel's No. 6 or No. 7 Tank (39) during a coastwise voyage from Eagle Point in New Jersey to Pilottown, Louisiana.[1] At the time of the alleged accident, plaintiff was working with two other members of the crew, his watch partner, George Schmidt, and "Frank," a deck maintenance man.[2] The three men were standing abreast of

1. Page references preceded by the letters "A" or "E" refer to pages in the Joint Appendix while other page references refer to pages of the trial transcript which is printed in its entirety in the Joint Appendix after A139.

2. Clearly Frank Wherrity, who from the vessel's crew list, (a copy of which was given to plaintiff's counsel) was a resident of Philadelphia, Pennsylvania, within the Rule 14 range of a Southern District Subpoena.

each other (see 188-189) at and alongside a butterworth opening (see Exhibits 1 and 1A, E1). They were removing a butterworth machine which had been suspended a distance of about 35' into the tank attached to a hose 2½" (434) or 4" (374) in circumference. Butterworthing, according to all witnesses, is a process whereby water is pumped through ship's lines through the hose and out the nozzle of the Butterworth machine. The machine consists of a rotary arm with holes in either end (see Exs. 1 E and F, E3), which is, of course, activated by the water pressure through the hose. After the machine is lowered in stages of from five to seven feet, it is allowed to run for a period of time determined by the bos'n, Angelos Antoniou, who according to plaintiff "timed the job" (209). After the predetermined number of drops were finished the machine was removed. The process, in effect, cleaned the tanks from top to bottom as water was sprayed by the machine against the interior walls.

Plaintiff and the other two men he said were working with him lowered and raised the machine into two or three butterworth openings prior to the alleged accident (167-168) and were again removing the hose and machine when according to plaintiff's testimony, he was injured. During trial, plaintiff, George Schmidt (who testified by deposition), Angelos Antoniou (who also testified by deposition), and Ike Isaac (an expert called by defendant) described the operation in essentially the following manner:

Plaintiff George Schmidt and Frank Wherrity approached the butterworth opening through which the hose and machine were suspended. The so-called center or anchor man, Schmidt, straddled the opening while plaintiff to his right grasped the hose and to his left Frank Wherrity grasped a manila line ½" or 3/4" in diameter (191) which was attached to the hose as near as practical to the machine. In a coordinated movement the anchor man, Schmidt, would bend and lift the hose with one hand and the line with his other (375) using a fingertip overhand grip (388-389). Plaintiff took up the slack in the hose which he passed through his hands, all the while maintaining tension, as

Wherrity to the left did the same with the line. The hose and machine was raised in stages or "strokes" as the anchor man reached, straightened up and released hose and line and repeated the process. Thus, 3 to 5 feet was raised per stroke (64).

According to plaintiff, after the second or third stroke was completed, Schmidt released the hose and line and at the same time Wherrity, in a fashion never explained, "lost control" (15) or let go of the line. This supposedly left plaintiff with the full burden, and he was allegedly jerked off his feet forward, down onto his hands and knees (77, 81) as the machine fell back into the tank (81).

Plaintiff, through his attorney, vigorously resisted any suggestion that Wherrity deliberately released the line, and his objection to questions in this respect was sustained (224-225), we feel, improperly. Plaintiff attributed the accident not to a deliberate act but to Wherrity's failure to step on the line (77-78) following completion of every stroke. This failure was very important according to plaintiff, and while to his attorney the fault was Frank Wherrity's failure to step on the slack end of the line (753), plaintiff himself during cross-examination said it was the failure to step on the taut end (198).

According to his testimony, plaintiff must have been standing close to the opening, and Isaac testified that all three would have been standing very close together, in fact "shoulder to shoulder" (428).

Although he had not been engaged in any shipboard tank cleaning since 1948 (53), had not been asked aboard the S/S OVERSEAS ALEUTIAN about his familiarity with the job (55) and while the machinery and operations in times past had been different (53-54), plaintiff, on the basis of previously having twice lifted the machine that evening, testified to proper procedure which for the purposes of this appeal is only the need to step on the manila line following every stroke in an operation which all, including plaintiff, agreed was continuous (194).

Obviously, and as Schmidt testified, the scene of the accident

can be visualized as three men abreast, one stooping and coming erect (Schmidt), one erect, or nearly so, braced to take slack and maintain tension in the line (Wherrity) and the other (plaintiff) on the hose similarly positioned, with the hose and line describing perhaps a 45° angle as both lay against the edge of the opening. Yet in these circumstances plaintiff's attorney would have had Wherrity stand on the slack end of the line as a "safety factor" (753) while plaintiff himself would have had his foot on the taut end, between his hands and the edge of the opening. This presumably would have required Wherrity to bring the line down to the deck while hooking his foot over it, to secure part of it with the weight of his body, or to continue alone to pull the line through his hands as he stepped toward the opening to place his foot on the line at the edge, or to let the machine lower into the tank as he walked the still taut line forward where again he might conveniently stop it with his foot at the edge of the opening. Thus, the man on the line was required to perform one of these eminently absurd operations in interruption of a continuous process, according to plaintiff, or to stand on the slack, according to his attorney, in which event Wherrity's putative failure could not have been the proximate cause of the alleged accident. This because plaintiff was holding the hose taut (193) and release of the line by "Frank" would have immediately produced the jerk on the hose and plaintiff's fall before the slack between Wherrity's hands and the deck would have been exhausted.

At trial plaintiff testified that the machine alone weighed 75 pounds (172) down from an estimated 250-300 pounds testified to at his deposition (174). He testified that it was 16" x 18" (170) in size. After looking at seven photographs of the vessel's deck as well as of the machine, line and hose, he testified "that (the butterworth machine depicted in plaintiff's 1-F) was what the *machine* will be attached to (59), that while reviewing these photographs he did *not* see the machine (59) and further, in response to a direct question regarding exhibits 1-E and 1-F, stated "no sir," the machine did not appear in either photograph

(59). Thus, plaintiff either deliberately lied by saying that the pictures did not show the butterworth machine, or did so inadvertently.

Yet if the latter be so, he testified to proper butterworthing procedure while so unfamiliar with the process as to not recognize the essential machine. But certainly plaintiff deliberately did not recognize the machine to preserve the illusion of its large dimensions as well as its alleged great weight which in reality was 35½ pounds (424). As much as 30-35 feet of the hose which was not slack, at the time of the alleged accident, i.e. after two or three strokes had been taken, weighed perhaps 60 pounds according to Isaac, who had weighed a similar hose while wet (436). Together the total weight lifted by three men was less than 100 pounds (424, 448-450) not the 300-500 pounds testified to by plaintiff (67). The hose and machine could certainly have weighed more if the hose was not permitted to drain after the system was shut down. In this respect, at two points in his testimony, plaintiff referred to water in the hose although Schmidt (417) and Antoniou testified that the water had been allowed to drain (338). Plaintiff's references are quoted in their entirety.

> Q. Can you give us an estimate (tne weight of the hose, the line and the machine)?
>
> A. Three to five-hundred pounds, I say.
>
> Q. All right?
>
> THE COURT: That is for what, the machine?
>
> THE WITNESS: The hose.
>
> THE COURT: The hose?
>
> THE WITNESS: And the water.
>
> THE COURT: The hose and machine?
>
> THE WITNESS: Yes, sir. (67)
>
> * * *
>
> Q. You say that it (the machine) weighs how much?
>
> A. I said between —with the hose, the machine, and the water in it, between 300 and 500 pounds. (172).

Over objection and despite a ruling by Judge Levet, the attorney for plaintiff insisted on insinuating in questioning of the expert, Isaac (441-442), that the hose had not been allowed to drain and did the same during the deposition of Schmidt and Antoniou. In summation, on this record, again despite objection, plaintiff's counsel told the jury "that this is how this accident happened . . . because it (the water) wasn't allowed to drain out" (757). Yet plaintiff had no authority over Wherrity or Schmidt and they none over him, (187) and the bos'n was not present according to plaintiff (67-68, 208) although his attorney was not sure entirely that he did not want him there (see 446). A perfect example of how plaintiff's silence (rather than having him testify and be cross-examined as to his responsibility for lifting a hose far heavier than necessary) can be distorted so as to become a solution by the obviously improper tactic of counsel in supplying a "fact" in summation, absent any support in the record.

To the contrary, Antoniou, a disinterested witness, testified that he was always present during the lifting of the machine out of the tanks, that he never saw the alleged accident to plaintiff, that in fact the accident described by plaintiff never occurred (340) and that the plaintiff never reported injury to his back, only that his back "hurt". Antoniou also testified that only later did plaintiff claim that his back had "been hurt" (see 328, 329, 341-342) during butterworthing, but *not* by being pulled to the deck where his shipmates let go. Indeed, plaintiff admitted that he never told Schmidt or Wherrity about the "accident," that he never told the bos'n and did not describe the manner of its alleged occurrence to the chief mate (see 219-220; Exhibit D where the "accident" [line 9 of the Report of Personal Injury] was to have occurred "at the process of butterworthing"). Neither did he tell the doctors at the New Orleans United States Public Health Service where his description was:

> " . . . states [that] he was pulling on a heavy hose on ship on June 8th when suddenly he had a sensation of something 'giving away' " (Exhibit I, 534).

Nor did he tell Dr. Seaman, the doctor chosen by plaintiff's attorney, about being pulled forward and off his feet on April 14, 1972, the time of his doctor's first examination, because Doctor Seaman believed the accident to be basically a hyperflexion injury due to bending and pulling (529, 530), the result of a pulling episode (527) which he described as hyperflexion or forward bending. Doctor Seaman, however, inadequately suggested that hyperextension, which might occur when someone is pulled forward off his feet, was the same as hyperflexion, but plaintiff's being pulled forward was the first "variation in the history" (530). The news that plaintiff had been allegedly pulled off his feet reached the doctor the morning he testified, as his testimony clearly demonstrates (526-531).

Additionally, Schmidt, the man that plaintiff said was present and working as the middle man at the time the "accident" allegedly occurred and who was also plaintiff's watch partner, testified unequivocally that the event described by plaintiff never occurred, that plaintiff was not pulled off his feet, that the line was never let go accidentally or otherwise and that to his knowledge plaintiff never had an accident of any kind or description at any time aboard the vessel (403-405).

Plaintiff's case was thus an unexplained letting go of the line and hose attached to the machine, without any demonstrated motive, which based on the trial record could not have weighed more than 100 pounds but which unbalanced this 190-pound plaintiff, who was braced against the weight he and the others were handling, where part of the weight was borne by the fulcrum at the edge of the opening against which the hose was resting. All these improbabilities *when he admitted that he failed to say anything or to complain to anyone aboard ship.* And plaintiff did not describe this remarkable event at the New Orleans Hospital, the Houston Street Clinic or to Dr. Seaman. In fact, prior to his deposition, his description of the event in suit is consistent with muscle strain caused by hard work, or a muscle pull of questionable severity which occurred while straining. In

brief, it was an "accident," or more properly an event, for which no argument for liability could ever be mounted.

The plaintiff's trial testimony was further rebutted by the statement of Francis Wherrity (Plaintiff's exhibit 7 for identification) in which he said that he had no recollection of plaintiff, and that to his knowledge no accident to anyone occurred, and that he could not remember anyone letting go of the line and hose. Plaintiff first offered to introduce this statement and much later, during summation, said to the jury that he wanted to "get it in" but that defendant objected. These references in summation were grossly improper, a matter to which we will again revert. But after these improper references, at the last stages of the trial, plaintiff objected to defendant's offer to put in evidence this very statement (893-897). Judge Levet refused to permit the offer (898) despite the jury's curiosity about its contents and the attorney's representation in open court to the jury in summation that he "wanted" to read it to them (745). Judge Levet thought that this ploy "may be some basis for a new trial" and that the remarks in summation constituted contempt of court (899).

Moreover, it is not at all clear that plaintiff had decided that he had been injured when pulled forward off his feet when his co-workers let go until shortly before trial, in view of plaintiff's attorney's disclaimer of this version of the alleged accident during the deposition of Schmidt (403). What is certain is that he never told anyone about the "accident," never complained to anyone aboard ship about the alleged neglect of Schmidt and Wherrity or about the alleged failure to supply a fourth man.[3]

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3. Throughout the trial plaintiff urged the need for a fourth man to act as a "safety man." The jury found against plaintiff on this count (see special verdict question No. 1) and this claim is thus mentioned here only as an example of the distractions raised during trial. Another was the alleged water left in the hose, about which his attorney made much and the plaintiff failed to testify. Another was the issue of a slippery deck ruled out by Judge Levet (see

As a result of his "injury," some findings of muscle spasm and tenderness in the low back were noted at the New Orleans Public Health Service Hospital, where plaintiff was a patient from June 12 to June 18, 1971. On June 21, 1971, he was seen at the United States Public Health Service Hospital, West Houston Street, New York, for complaints of back pain radiating into his testicle (Exhibit C). In 1973 plaintiff was seen at the New Orleans Clinic for prostatitis, which he apparently conveniently coupled with a more orthopedically oriented claim of back pain since low back X-rays were taken. (See Exhibit I). He had complained of pain in his back and testicles as long prior as 1967 while at the San Francisco Public Health Service Clinic where muscle spasms also were noted. Plaintiff has a history of "probable" prostatitis with back pain in 1967 as well as a subsequent episode. He had gonorrhea, a well recognized cause of prostate infection, "5 x 6" according to plaintiff's New Orleans Public Health Service record, Exhibit 3 (Defendant's "I"). This record was put in evidence first by plaintiff, without request for excision of this reference.

Prostate infection, however caused, can cause pain in the low back and spasm according to Dr. Seaman (558, 561); and, according to Dr. Lodico (the doctor called by the defendant), back pain radiating to the testicles, identically as complained of by plaintiff on June 21, 1971 but 13 days after the accident, is a classic symptom of prostate infection, (631), which may be caused by gonorrhea, according to Dr. Lodico. Plaintiff admitted back pains on and off "All [his] life" (128) and conceded that back pain accompanied episodes of prostate infection (148). Moreover, the gradual onset of plaintiff's pain (he continued working and stood his ensuing 12 to 4 watch and did not request medical assistance until 11:30 the next day (Exhibit D and 84))

394-400). In this latter regard, the attempt to inject this false issue despite plaintiff's pre-trial testimony to the contrary (420-421), taken with counsel's vehement reaction to the adverse ruling, demonstrates the weaknesses of plaintiff's claim, as well as the lengths counsel would go to improperly force an invalid issue before the jury.

is inconsistent with classic symptoms of traumatic sprain where pain is greatest at the time of injury and gradually abates after passage of an accute stage, according to common experience as well as Dr. Lodico (648).

Plaintiff was declared fit for duty initially on August 6, 1971, and the Houston Street Clinic records indicate that findings followed an orthopedic examination by a consulting specialist which plaintiff attended walking with a cane. Dr. Seaman euphemistically characterized plaintiff's use of a cane as "self prescribed" (569). At that time the orthopedist found plaintiff able to climb on and off the examination table with "great agility" and to be without any objective sign of injury (568). There followed a period of return visits to the clinic for complaint of cough related to bronchitis (591), pains in the chest and, finally, renewed complaints of back pain.

On March 10, 1972, plaintiff was reexamined by the consulting orthopedic specialist whose examination was again completely negative. The specialist apparently took a seriously dim view of plaintiff's subjective long standing complaints of testicular pain. Dr. Seaman testified that the doctor's use of quotes in his report around the word "explain" indicated to him that the orthopedist wanted a psychiatrist to verify his opinion that plaintiff was a "liar, thief and a faker" (579-580) for pressing an invalid complaint of continuing orthopedic disability.

On August 17, 1972, after returning to the clinic with Dr. Seaman's report, plaintiff was declared not fit for duty because of lumbosacral strain entirely without notation of any supporting objective findings. Plaintiff's counsel and Dr. Seaman suggested the clinic was neglectful in not noting observed findings in an attempt to disguise the fact that the diagnosis of lumbosacral strain followed wholly from subjective complaints (614). In 1970 plaintiff was seen at the United States Public Health Service Hospital—San Francisco—with complaints diagnosed as "anxiety reaction" following upon complaints of fearfulness of

harm from fellow seaman during a voyage aboard S/S PECOS in that year. In 1973 on January 7, plaintiff claimed he sustained injury to his thumb due to the act of a fellow seaman.

But Judge Levet ruled out any reference to plaintiff's psychiatric history (see Court Exhibit 11, E155-161) despite proof of prior history of psychiatric treatment following apparently unfounded fears of harm from shipmates, despite the essentially similar claim of this suit, as well as that still later aboard S/S LONGVIEW VICTORY where his thumb was allegedly injured through the act of a fellow member of the crew of that vessel.

MISCONDUCT BY PLAINTIFF'S ATTORNEY

Throughout the trial the attorney for plaintiff engaged in highly questionable tactics in order to distract the jury from the merits of the case. This took a number of forms. Perhaps the principal one was the attack on the court's impartiality which was made by direct reference as well as by threat of appeal. Second, the attorney for plaintiff misrepresented the court's evidentiary rulings in a manner calculated to prejudice the minds of the jury against the defendant. Third, he misrepresented the character and substance of the evidence during summation.

In summation, the attorney for plaintiff began his closing remarks by suggesting that the court's conduct of the trial had not been "normal," which he immediately coupled with a representation that *his* excesses had been necessary to "help . . . [plaintiff] . . and to *protect* him" (742). In this fashion the alleged unfairness to plaintiff became the central issue. But not yet satisfied, the attorney for plaintiff continued by flatly claiming that the court had been unfair by saying that " . . . if [the attorney] . . . felt at any time—and I did, and you know it—that in some way the matter was not being handled evenhandedly . . . " (742). At this point, of course, the court interrupted, directing the jury to disregard counsel's statement

that the court was unfair. But the attorney, characteristically, ignored the court's directive *to him* and proceeded, by virtually finishing the sentence interrupted by Judge Levet, by saying "then you know it is my duty to act as *I see fit* for the best purposes of my client, and you would want the same" (742). He then proceeded to "apologize" to the jury for his action, all allegedly made necessary to protect plaintiffs "rights," and, indeed, for the behavior of the court by asserting that the jury had been "burdened" and had unfortunately been forced "to see what went on this last week." The attorney proceeded even further, causing Judge Levet to again admonish the jury, by alluding to the "way the case was tried" (742-743).

Only moments later, after plaintiff's counsel improperly referred to Wherrity's statement (Exhibit 7 for identification, E97-99) Judge Levet again admonished the jury to disregard counsel's statement concerning that which he "wasn't allowed to get in." In further colloquy the court, seconds later, again admonished the jury "not to take any notice of this statement," which prompted the immediate response of counsel "The statement is there. I cannot read it to you. I cannot get it in. I wanted to. I cannot" (745). Objection, of course, followed whereupon the attorney said to the court in front of the jury "so that there should be no question about it, there will be an appeal" (745). Again the jury was told to disregard counsel's remarks. In all, there are five admonitions to the jury to disregard statements of counsel appearing in the first five pages of the transcript of plaintiff's attorney's summation.

But as subsequent events revealed, plaintiff's attorney did not wish Wherrity's statement shown to the jury. This statement, taken some months after plaintiff's deposition, contains the representation that Wherrity could not recall plaintiff, could not recall any accident where anyone "left [sic] a machine go (E97)" and was not aware of any accident to any member of the crew during the voyage. He also stated, however, that it takes "at least four men to pull the machine out [of the tank]." After the close of evidence, after the repeated improper reference to

the statement by counsel, *he* rejected the offer of the statement made by the attorney for defendant. Interestingly, the attorney took the position in opposing post trial motions that the admission of the statement would have had too dramatic an impact and "would [have] highlight[ed] it far out of its importance" (A42). But it was, of course, his wish to highlight the illusory "contents" of the statement which prompted counsel's insistance on bringing it before the jury in summation by stating that "[he] wanted to read it to you, that [he] wanted to get it in" (745).

That there are legitimate trial tactics whereby an attorney seeks to present the evidence in its most favorable light cannot be denied. This recognition must stop short of sanctioning in open court a deliberate misrepresentation of intention regarding what might well have been considered a key piece of evidence. Can an attorney make an offer of evidence, exploit fully the objection of opposing attorney, refer again in summation to the evidence, persist in such allusion despite the court's admonition, and later refuse to admit the document which he, himself, offered?

Plaintiff's counsel similarly distorted the court's ruling on the issue of plaintiff's history of multiple bouts of gonorrhea. It should be borne in mind and we now repeat that *plaintiff's* Exhibit 3 contains reference to gonorrhea "5 x 6" (E12) and that these records were placed in evidence by *his* attorney, *without* request for excision of *any* reference.

In discussion of the admissibility of portions of the San Francisco Public Health Service Hospital records, the attorney for plaintiff asked Judge Levet to delete a report indicating "VDRL NON REACTIVE" (546, exhibit J, E127). There was no discussion whatsoever of gonorrhea and the attorney never went so far as to explain why this part of the record should be excised, except to say that the report was "psychiatric" and irrelevant. He characterized it as a hematologist's report (552) and as such would be a test for syphillis. The entire "discussion" of the admissibility of reference to "venereal disease" appears at

p. 536 to 554. That there was no prior discussion much less a prior ruling by the court is clear.

At page 632 Dr. Lodico was asked, after a proper foundation had been laid, whether plaintiff's hospital records from New Orleans disclosed a history of gonorrhea. The attorney for plaintiff immediately objected, telling the jury that the court had previously ruled on the subject and that "Mr. Stearns has deliberately thrown this matter before the jury." Judge Levet sustained the objection noting, however, that he did not recall any prior ruling. Not satisfied, the attorney persisted saying "Mr. Stearns, I hope you are satisfied. You struggled for four days to get that in." He was again admonished but, again, characteristically, to no effect. Thus, when immediately again admonished the attorney persisted by telling the jury that the defendant's attorney " . . . deliberately disobeyed your Honor. Your Honor told him, in Your Honor's robing room, that it was not to be put in." But the controversy did not even stop there. At page 633 the attorney again replayed his consistant theme that the defense was unfairly overreaching plaintiff, causing "comment" from counsel to protect his client. In this regard plaintiff's attorney said that the court's admonitions were "laughable" and that the reference to a matter, in fact, earlier introduced in evidence by himself was "one of the ugliest things [he] had ever seen" (633).

Of course, no prior ruling on evidence tending to connect plaintiff's pain in the back with prostatitis (see plaintiff's admission on cross examination of the connection of these two complaints at (148), with his history as of 1971 of gonorrhea five or six times had been made. Plaintiff's position regarding this matter was, in Judge Levet's word, "absurd" (635) but in fact it was not. It was carefully calculated, and the attorney knew at the time of his representation of a prior ruling that none in fact had been made. Realizing the advantage secured by his misrepresentation, the attorney returned to the subject during summation. At 768 he began an allusion to the defense attorney's "great effort to get in the reason for it [plaintiff's

prostatitis]." At this point he was stopped, the court saying that the reference was out of order, a ruling with which the attorney immediately disagreed. Yet when told to proceed, counsel returned to the subject by referring to the "literal [sic] attitude toward our fellow people" (769), in a portion of the transcript misdesignated as comment by the Court.[4]

Reference to gonorrhea was improperly excluded, and the attorney succeeded further in suggesting unfair conduct by the defense and, in fact, made a virtue of plaintiff's history of gonorrhea. All that was required to secure this advantage was the deliberate misrepresentation to the jury that there had been a ruling on the issue, when in fact there had been none.

In his opinion of May 21, 1975, denying defense post-trial motions, the court characterized the attorney's conduct as improper and disrespectful of both the court and opposing counsel. However, Judge Levet believed that the prejudicial effect of this acknowledged misconduct had been immediately cured by the court's admonitions to the jury—this was simply not the case. As we noted above, Mr. Goldstein, at p. 633 of the trial transcript, characterized the court's admonition to disregard the defendant's attorney's question regarding the possible cause of plaintiff's chronic prostate infections as "laughable."

And what effect can an admonition have when according to the version of the trial espoused by plaintiff's attorney the court is "trying to destroy a lawsuit" (398), when threat of appeal is made before the jury (295-296, and 745) and counsel asserts that the matter is not handled "evenhandedly," when, in fact, it is bluntly suggested to be a rigged proceeding, when the defense and the court are inferentially said to be conspiring against plaintiff, saved only by the valiant effort of counsel to "protect" him. From what? And what of the canons of ethics?

Mr. Goldstein's preconceived notion of Judge Levet's

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4. The "Goldstein" reference at 769, line 10 was inserted by Judge Levet or his law clerk during review of the transcript in connection with post-trial motions.

prejudice is simply not borne out in the record. In fact, at virtually every important juncture the court ruled *in plaintiff's favor.* Thus, the Court did not permit cross-examination of the critical issue of plaintiff's possible belief that Schmidt and/or Wherrity intentionally tried to hurt him, which should have been allowed to at least test the believability of plaintiff's description of the "accident", since any legal issue aside, the claimed occurrence could be seen as less believable if plaintiff claimed it was intentional; in not permitting evidence showing plaintiff's prior, apparently irrational, fear of harm from shipmates, and in refusing to allow Dr. Lodico to associate plaintiff's gonorrhea with his physical complaints, attributable perhaps as much, on the record of this trial, to persistent prostatitis as to any injury. Compare the latitude allowed Dr. Seaman, who was permitted to suggest an inguinal strain as the cause of the radiating pain to the testicles complained of on June 21, 1971, 13 days after plaintiff's accident, (565), with that given Dr. Lodico. Compare, as well, the propriety of the "cross examination" of Dr. Lodico, the references to insurance and blunt suggestions of Dr. Lodico's dishonesty, with that of Dr. Seaman. Reading this portion of the transcript (640 to 667) is illustrative of the manner in which the case was tried. Plaintiff's counsel in full voice, shouting the message that the defense was unfair, that its testimony was false, despite warnings to the attorney by the court to desist, all of which were ignored.[5]

The impact of this misconduct was acknowledged by the attorney himself in his summation when he said:

> "I know it is rather hard because of what happened during the course of the week in the battles in this

5. See p. 666 where counsel's question beginning "anything that is in the hospital record . . . [is] incorrect" is objected to. The objection was sustained. But see the immediately ensuing question "Doctor are you saying that anything in the record is inaccurate?" Also at p. 662 the attorney began his speech to the doctor ". . . do you think it's fair . . . " and after objection was sustained and counsel admonished to "stop shouting," he yet returned to the same point with a question prefaced by "Doctor do you expect this jury to believe" (663).

courtroom, but the fact remains that your situation is to determine the facts of this case . . . " (751)

PLAINTIFF'S CREDIBILITY

In addition to the inherent improbability of plaintiff's claim of Wherrity's neglect and plaintiff's unexplained failure to express his claim of injury to anyone before his pre-trial deposition, his credibility is further called into question by his distortion of the weight and size of the butterworth machine and the circumstances of his leaving the S/S LONGVIEW VICTORY which he joined in November 1972, some 16 months after his alleged accident. Thus, in response to questions on direct examination, plaintiff testified to continued back pains during his service on this vessel (97-100) and powerfully suggested that his reason for signing off after a five-month voyage was due to the "injury" in suit. Much, no doubt, to his attorneys surprise, plaintiff, in fact, left the S/S LONGVIEW VICTORY because of pains in his chest, according to the S/S LONGVIEW VICTORY master's certificate (Ex. A, E100) filled out in plaintiff's own hand. The LONGVIEW VICTORY Medical Log, (Ex. K, E107) moreover, disclosed no complaint by plaintiff whatsoever of back difficulty during the entire time of the voyage. And plaintiff in response to direct questions by the Court and counsel for defendant flatly denied any subsequent injury aboard this vessel (97, 107) when in fact he allegedly injured his thumb in January 1973. Plaintiff denied this accident to the court and defendant's attorney on cross-examination, despite having engaged an attorney, started suit and having given a deposition. Of course plaintiff, as we discussed above, in response to his attorney's questions, also looked at pictures of the butterworth machine and three times denied that it was depicted.

But the credibility of this disingenuous plaintiff was perhaps most severely compromised by his failure to report the alleged accident about which he also failed to complain (213-215).

Despite allegedly sever e injuries plaintiff unaccount ly failed to ask either Schmidt or Wherrity why they had let the hose and line go (420-421). And plaintiff's claim of accident finds no support in testimony or representations of those whom he claims were present, and the bos'n, who swore that he was always present when the machines were removed, also testified that the accident described by plaintiff was neither seen nor mentioned. This we believe makes for an indeed "close" case.

THE DEFENDANT IS ENTITLED TO A NEW TRIAL FOR REASONS OF MISCONDUCT BY PLAINTIFF'S ATTORNEY

Since the evidence at best barely supports the verdict in this case, if in fact it does at all, plaintiff's attorney's misconduct mandates a new trial. In *San Antonio v. Timko,* 368 F.2d 983 (2 Cir., 1966) Judge Friendly held defendant entitled to a new trial because of plaintiff's attorney's improper argument during summation that the concern of the defense about plaintiff's damages was tantamount to a confession of liability. At page 986 Judge Friendly stated:

> . . . Where the evidence thus barely supports the verdict, an incident at the trial that might be ignored where the case was stronger demands reversal.

The rule is that the court must be assured that the verdict in a close case *was not* the product of misconduct. In *Missouri —k— T.R. Co. of Texas v. Ridgway,* 191 F.2d 363, 370 (8 Cir., 1951), the Court, discussing its reversal of a lower court judgment which followed its finding that an attorney had used the "highly reprehensible" tactic of implying in summation that facts had been suppressed by opposing counsel, stated:

> . . . we can not hold that defendant has had a fair and impartial trial and that the verdict *was not* the result of passion and prejudice aroused by the appeals of counsel in his argument. (Emphasis supplied)

In *Kroger Grocery & Baking Co. v. Stewart,* 164 F.2d 841 (8 Cir. 1947), the court after commenting on the "distracting" effect of an attorney's misconduct stated the rule as follows:

> . . . This court, in the interest of an orderly administration of justice, will continue to do all that reasonably may be done to assure litigants that a trial in a district court of the United States shall be so conducted that the verdict of the jury fairly *may be assumed to be* based upon an impartial consideration of the evidence and the applicable law. (Emphasis supplied)

To the same effect, see *Kiefel v. Las Vegas Hacienda Inc.,* 404 F. 2d 1163, 1165 (7 Cir., 1968), where the Court of Appeals quoted trial judge Edward A. Robson who in granting plaintiff a new trial had held at 39 F.R.D. 596:

> The court is convinced that because of the unprofessional tactics of Reese Hubbard, counsel for defendant, the plaintiff did not have a fair trial. Counsel for defendant is a lawyer who has had long and extensive trial experience. These years in the court should have taught him compassion and a sense of fair play. Instead, he seeks to use his experience to assert and apply every sly trick and strategem to win his case. He does this with the hope that he could stay within the bounds of professional ethics. In this instance, he has far overstepped the bounds. This court finds that his trial tactics were such that the jury *might* or *could have been* influenced by his unfair actions and as a result found for the defendant. (Emphasis supplied).

Misconduct by counsel can take many forms during the course of trial and each case of alleged misconduct turns, of course, on the gravity of the specific instances considered.

In *Mangan v. Broderick & Bascom Rope Co.,* 351 F. 2d 24, 29 (7 Cir., 1965), the Court of Appeals considered the introduction by the counsel for the defendant of evidence of Workmen's Compensation, which it characterized as "gross error." At

p. 29 the Court continued by saying:

> [Defendant's] counsel's willingness to interject that evidence into the case at any cost is sufficient earn him a new [illegible] for plaintiff.

In *Sinovich v. Erie Railroad Co.*, 230 F. 2d 658, 662 (3 Cir. 1956), the Court considered the reiteration in summation of evidence that plaintiff was receiving a pension, which had been earlier excluded, basis for granting plaintiff a new trial:

> Under all the circumstances it seems to us that the last moment reiteration by the defense . . . of [evidence] gravely and unwarrantedly impaired the worth of plaintiff's claim to the jury. He is entitled to a new trial.

The *possibility* of confusion, passion, prejudice or mistake engendered by misconduct has been said to be basis for grant of a new trial. In *Kernan v. Gulf Oil Corporation*, 201 F. Supp. 117 (D.C.E.D. Pa., 1961), rev'd on other grounds, 317 F. 2d 737, on remand, 231 F. Supp. 339, the Court conditionally granted a new trial because of counsel's continuous arguments to the court. Considering the character of the evidence presented in conjunction with the misconduct of counsel, the Court held at p. 121:

> Finally, in the opinion of the Court, the verdict of the jury was contrary to the weight of the evidence and had they not been confused or affected by the manner in which the case was tried, their verdict, we believe, would have been in favor of the defendant.

In *Kernan* as in the case here, plaintiff's case rested heavily upon speculation and possibility.

The effect of misconduct during trial was discussed by the Eighth Circuit Court of Appeals in *London Guarantee and Accident Co. Ltd. v. Woefle*, 83 F. 2d 325 (1936), during which the Court observed (at p. 434):

> Jurors do not ordinarily know the difference between proper and improper argument. They easily obtain the

impression that objecting counsel is unfair and is trying to keep them from hearing something of consequence. While the judge is in a better position to deal with improper argument, his task is also one of great delicacy. He should do all that reasonably may be done to keep counsel within bounds, but his interference with argument may have the very opposite effect intended. Those things are best known to those members of the profession who do not hesitate to appeal to passion and prejudice in the trial of their cases. The truth is that when a lawyer departs from the path of legitimate argument, he does so at his own peril and that of his client and if his argument is both improper and prejudicial then he has destroyed any favorable verdict that his client may obtain, unless, in some way, his error has been cured prior to submission of the case to the jury.

The suggestion during summation of a subornation is basis for a new trial. In this case the attorney for plaintiff told the jury:

> Mr. Antoniou under oath testified that he always had three men there. But I suggest to you that, more important than what Mr. Antoniou testified to under oath, after he had been prepared to testify by an attorney . . . (749).

This was immediately followed by counsel's assertion while discussing Antoniou's statement, of this witness's change of testimony:

> . . . because they wanted him to say, to change his story just a little bit to say that there were three men there (750).

Judge Learned Hand in *Brown v. Walter,* (2 Cir., 1933) 62 F. 2d 798, 799, discussed similar impropriety in the following terms:

> Nobody can read the summation without being satisfied that the real issues are being suppresssd, and the picture

> substituted of an alien and malevolent corporation, lurking in the background and contriving a perjurious defense. A judge, at least in the federal court, is more than a moderator; he is affirmatively charged with securing a fair trial, and he must intervene *sua sponte* to that end when necessary . . . Justice does not depend upon legal dialectics so much as upon the atmosphere of the court room and that in the end depends primarily on the judge."

In *Koufakis v. Carvel,* 425 F. 2d 892 (2 Cir., 1970), the district court judgment was reversed and a new trial for defendant ordered when the court found that the summation was based on an appeal to passion and prejudice, not warranted by the proof and thereafter discussed the plaintiff's contention that the prejudice caused by the attorney's remarks was cured by the court's instructions. At page 904 Judge Lumbard held:

> Appellee urges that some or all of the prejudice caused by Mr. Berg's many indiscretions were cured by the trial judge's charge. Where the number and gravity of counsel's improprieties reach the level presented by this record, the admonitions by the trial judge in the charge and in response to specific objections cannot possibly serve to cure all the prejudice.

In this regard multiple objections by the party aggrieved have been held to be "hazardous" in *London Guarantee v. Woefle, supra,* as well as *Altoona Clay Products Inc. v. Dun & Bradstreet, Inc.,* 286 F. Supp., 899, 903 (W.D. Pa. 1968). Even failure to object to improper comment by counsel is not necessarily significant. See *Robinson v. Pennsylvania R.R. Co.,* 214 F. 2d 798 (3 Cir., 1954), as well as *San Antonio v. Timko, supra,* where no objections were made to references to defendant's contest of the issue of damages.

In connection with the general consideration of the question of misconduct and its possible effect on a jury verdict as well as on the proper supervision of trials in the district court, see *Berguido*

v. Eastern Airlines, Incorporated 35 F.R.D. 200 (D.C. E.D. Pa., 1964); *Fortunato v. Ford Motor Co.*, 464 F. 2d 962, 975 (2 Cir., 1972) (dissent of Judge Mansfield); *Collins v. Penn Central Transportation Company*, 497 F. 2d 1296, 1300 (2 Cir., 1974) (dissent of Judge Lumbard).

In denying defendant's post-trial motions Judge Levet held himself "bound under the rules of law pertaining to new trials to deny the motion of defendant" (A40). This after citing Canon 7 of the Code of Professional Responsibility and finding as a fact that the conduct of plaintiff's attorney was improper due to his intemperate statements which were "undignified and discourteous to either defense counsel or the court" (A38). Judge Levet, however, believed that the misconduct of the attorney for plaintiff did not result in any prejudicial effect because such was immediately removed by his curative instructions to the jury to disregard the attorneys many acts of misconduct. That Judge Levet *attempted to do* what was possible to cure the obviously intended prejudicial effect of the attorney's misconduct is clear from the record. But it is questionable whether the court's instructions had any impact, and it is far more likely that they were ignored. And it cannot be denied that Mr. Goldstein himself consistently ignored the court's admonitions, and it may be inferred that it is correspondingly likely that the trial jury did so as well. For example, in discussion before the jury of the alleged prior ruling by the court regarding plaintiff's history of gonorrhea (632-633), the attorney for plaintiff made the improper statement that the attorney for the defendant had "struggled for four days to get [this evidence] in." Upon being told not to comment further, he immediately rejoined with the remark "and you finally got it in." When told to sit down plaintiff's attorney repeated the charge that there had been a prior ruling on the issue. And yet he still refused to abandon the issue, insisting in front of the jury that "we have this out once and for all." And when again admonished, Mr. Goldstein fueled the controversy further by alleging that the reference to gonorrhea was "one of the ugliest things [he] ha[s]

ever seen," after characterizing the court's admonition to the jury to disregard statements of counsel as "laughable" (633). Thus the court's admonition *to plaintiff's attorney* was wholly without curative effect. Repeated admonitions had the result of only further encouraging the attorney to reassert the alleged unfairness of the attorney for defendant and his corresponding need to intervene in order to "protect" his client. All of this was, of course, consistent with Mr. Goldstein's expressed need to proceed as "[he] saw fit" despite *any* admonition by the court at any time during the trial.

Moreover, the very nature of the attorney's misconduct, which was in large measure an attack on the impartiality of the court, and hence on Judge Levet's credibility, had the designed effect of encouraging the jury to ignore the court's admonitions. These tactics and the persistent attempts to bully the judge by shouting deprived the court not only of the dignity due it but necessarily lessened the impact any admonition might have had on the jury.

In the case cited by Judge Levet following discussions of the attorney's misconduct, *Van Iderstein Company v. RGJ Contracting Co. Inc.*, 480 F.2d 454, 455 (2 Cir., 1973), Chief Judge Kaufmann noted initially that a new trial would have been required if "more than an *insubstantial portion* of counsel's intemperate behavior had been brought to the attention of the jury." This case, clearly intended by the Chief Judge as a warning to counsel about behavior during trial, contains no reference to any possible curing of misconduct through admonitions by the trial judge or in fact to the strength or weakness of the evidence presented. Judge Kaufmann spoke only of the need to maintain orderly conduct and procedures during trials in the district courts, particularly, we might suggest, before a judge of the stage in life, distinction and long tenure as Judge Levet. But the attorney for plaintiff, throughout the trial of this case, challenged the court's authority and through what appears to have been expression of strong personal prejudice against the trial judge created a tumultuous atmosphere which he himself in summation acknowledged was improper and would make the

jury's deliberations "very difficult" (751).

Finally, the attorney for plaintiff addressed the court, while presenting exceptions to the charge which were without substance, in terms wholly inappropriate to the proceeding. In purportedly commenting on this court's charges, Mr. Goldstein told Judge Levet "I was embarassed for them and embarassed for you" (819) and that the charge was an "absolute disgrace." In response to this latter statement, the court asked the attorney for plaintiff not to say "anything personal," a request which the attorney immediately refused (820). This "discussion" was conducted by Mr. Goldstein in full voice and in his words was for the purpose of "mak[ing] a record for the Circuit Court . . . [to] . . . finish this type of charge once and for all." Judge Levet properly interpreted this as a threat, remarking that the attorney was "close to" contempt. Yet Mr. Goldstein continued by saying "I am disgusted by what I heard out there" (821).

THE DEFENDANT IS ENTITLED TO A NEW TRIAL ON THE BASIS OF IMPROPER EXCLUSION OF EVIDENCE

Upon objection of the attorney for plaintiff, Judge Levet removed from defendant's Exhibit J pages of plaintiff's San Francisco Public Health Service Hospital records regarding his treatment for "acute" anxiety reaction in early 1970, some 16 months before joining the Overseas Aleutian (Court Ex. 11, E155-161). Plaintiff testified that he subsequently sailed aboard the S/S AZALEA CITY in 1970 but was without employment from the time he left that vessel until joining the defendant's vessel on June 8, 1971. He gave no reason for remaining out of work for this extended period. Plaintiff's psychiatric history dealt with his apparently unfounded fears of physical harm from shipmates. As noted above, plaintiff, without medical justification, insisted upon walking with the aid of a cane when he saw the Houston Street orthopedist and when he was first seen by Dr. Seaman in April, 1972 (472). During examination by Dr.

Lodico in 1973, plaintiff complained of feeling a numbness in one-half of his upper body, a complaint which the doctor characterized as functional (628). It would also appear certain that plaintiff clumsily misrepresented the facts when he testified that certain photographs, plaintiff's Exhibits 1E and F, did not depict the butterworth machine and when he denied a subsequent accident aboard S/S LONGVIEW VICTORY in 1973. In addition, plaintiff's hospital records are replete with vague and unsubstantiated complaints of pain, particularly of pains in the chest, which complaint he voiced upon leaving the S/S LONGVIEW VICTORY in March, 1973. In addition, at the time of his period of alleged convalescence at the United States Public Health Service Clinic at Houston Street, plaintiff complained of "sexual weakness" (E23).

In a civil case it is admittedly necessarily a close question when a trial judge is requested to permit potentially prejudicial evidence such as that as of a party's psychiatric problems. On the one hand lies the court's concern that no prejudice, in fact, result from plaintiff's unfortunate history and on the other the need to afford the defendant reasonable latitude in impeaching the credibility of a witness's testimony through evidence of possible psychiatric impairment. We will concede that the matter lies within the sound discretion of the trial judge, but on the facts of this case suggest that discretion was improperly exercised, given the bizarre nature of plaintiff's claim of injury, the bizarre nature of his physical complaints prior and subsequent to the accident in suit and because the claim of accident closely parallels (or certainly might be so seen) the unfounded fears expressed in early 1970. Moreover, plaintiff's entire case, was supported only by *his* fragile testimony. See *United States v. Hiss*, 88 F. Supp. 559 (D.C. SDNY 1950).

The cases dealing with the question of admissibility of psychiatric history to impeach credibility are found all but exclusively in criminal cases where, we acknowledge, the defendant's right to attack credibility might be broader than in a civil suit. However, the underlying principles should remain the

same. In criminal cases the question of a witness's history of mental disorder has been termed "essential information affecting . . . credibility," *United States v. McFarland,* 371 F. 2d 701, 705 (2 Cir., 1966). As Judge Feinberg further acknowledged, the competence of a witness to testify is a matter of the gravest impact, although a psychiatric history as such does not make a witness incompetent as a matter of law. *Ibid.* Likewise, in *United States v. Partin,* 493 F. 2d 750, 762 (5 Cir., 1974), that court held:

> The readily apparent principle is that the jury should, within reason, be informed of all matters affecting witnesses' credibility to aid their determination of the truth.

In *United States v. McFarland, supra,* the prosecution witness had been hospitalized for psychiatric reasons for a period of eight months, eight months before the trial. The Fifth Circuit, in *Partin,* spoke of psychiatric treatment "probatively related" to the time period about which the witness was attempting to testify. In a discussion of developments of the science of psychiatry as it relates to trial matters, particularly witnesses' credibility, which appears at 21 F.R.D. 199, 204, the prevailing attitude was said to be "liberal as to competency" and the tendency is, accordingly, to permit an attack on credibility on the basis of mental illness.

All the factors of this case taken together indicate that Judge Levet, in exercise of his discretion, should have permitted evidence of plaintiff's psychiatric history, subject, of course, to proper instructions to the jury as to what weight they might or might not accord such evidence.

THE JURY'S AWARD FOR PAST LOST WAGES EXCEEDED THE PROOF

Of the jury's verdict in plaintiff's favor $8,500 was for past pain and suffering and $16,500 for past lost wages. The award for past lost wages was more than asked for by the attorney for

plaintiff during summation and is not supported by the evidence. In summation, the attorney stated that plaintiff, as a result of the accident, had been out of work for a seventeen month period from June, 1971 to November, 1972. According to the attorney, plaintiff's work history, excluding the thirteen month period just prior to joining the S/S Overseas Aleutian, showed an average of eight and one-half months work per year (772). On the basis of plaintiff's testimony of wages of $900 per month (31), the attorney calculated lost wages of $10,800 "up to the time of November of 1972" (773). He then made claim for "additional periods" referring to plaintiff's service aboard the "Jeff Davis" in 1973. After objection, the attorney suggested that he inadvertantly had failed to elicit testimony of periods of disability between November, 1972 and the time of trial, but that plaintiff had testified that he "is unfit for duty now, or he was unfit for duty recently" (773).

Plaintiff did testify that he experienced the "same kind of pain" in the "same area" (98) aboard the "S/S LINNFIELD" (should be Longview) VICTORY in late 1972 and 1973, about which he complained to the Chief Mate. But the S/S LONGVIEW VICTORY Medical Log (Exhibit K, E107-115) makes no reference to any such complaint, and, according to the Master's Certificate filled out in plaintiff's own hand (Ex. A, 117), he left the vessel complaining only of "chest pains;" the record is barren of any probative testimony by plaintiff regarding any period of "disability" after November, 1972.

Defendant's Exhibit I does show that plaintiff was treated in New Orleans for "G.U. Infection" on October 15, 1973 and that on October 16, 1973, a "negative" X-ray of the lumbar spine was taken, and he was declared fit for duty. (Ex. C). The Houston Street Out-Patient records show numerous visits by plaintiff in 1973 for chest and thumb pains as well as cramps in his legs and feet. On January 16, 1974 plaintiff again complained of "lower back pains" but was declared fit for duty (E40). These complaints resumed in April of that year, but again he was declared fit for duty, as he was in May, 1974 (E41). On September 30,

1974 plaintiff was declared not fit for duty for a period of two weeks because of his back (E42). On October 15, 1974, however, he was declared fit for duty. There is no proof, therefore, of any period of disability other than the eight and one-half months claimed by the attorney until November, 1972, except fifteen days in 1974. The total lost wages "proved" would therefore be a maximum of $10,800 until November, 1972 and $450 for the period in 1974, or $11,250-$5,250 less than awarded.

But the alleged initial seventeen month disability period is not supported by the outpatient clinic records either. Plaintiff was not fit for duty because of his back from the time of the alleged accident until August 6, 1971 (Ex. C, E24). On September 7, 1971 he returned to the clinic complaining of pain in his upper thorax and chest (E25) for which an electrocardiogram (EKG) was performed. On September 16, 1971 he had a "persistent . . . cough" (E25) and was declared not fit for duty "Thoracic Spine" (E26). Plaintiff's coughing became the focus of treatment, and he was continued in a not fit for duty status through March 10, 1972 (E31) when declared by the general clinic to be fit for duty following a second negative orthopedic examination. From March 10, 1972 until August 17, 1972 when he returned to the clinic with Dr. Seaman's report (E32) he was fit for duty. On September 26, 1972 (E33) he was again made fit for duty.

Plaintiff was, therefore, not fit by the standards of the United States Public Health Service from the date he left the Overseas Aleutian until March 10, 1972, with the period between August 6, 1971 and that date being seemingly due to reasons other than the alleged injury in suit. According to plaintiff the benefit of all doubt, however, no more than eight months, June 12-August 6, 1971, September 7, 1971-March 10, 1972, plus two months, August and November, 1972, plus two weeks in 1974, or ten and one half months lost time, was established. Applying counsel's concession that plaintiff would work two thirds of the time, only a little over seven months was "lost" due to the "accident," and the proven lost wage claim cannot be said to exceed $6,300.

Additionally, on this record of coincidence of back pain with prostatitis, the award for pain and suffering is clearly excessive.

CONCLUSION

Defendant urges that the issues presented on appeal are of the highest significance, although at the same time acknowledging that perhaps particularly in a Jones Act case it has been said that factual issues are peculiarly for the jury to decide. But this being the law, it is therefore essential that these deliberations go forward in the calm and respectful atmosphere which the very importance of the task should compel—legal "fireworks" whereby a trial attorney vigorously dramatizes the evidence is a different matter. Emphasis and other legitimate tools of skilled advocacy should not be left undistinguished from deliberate distraction and confusion of proof, nor a witness' dissembling from his confusion or innocent error.

No where is the possibility of fraud more prominent than in the trial of personal injury cases, particularly when the day may be carried solely by testimony to which the highest imputation of interest attaches—that supplied by plaintiff himself—despite its additional defects here in way of inherent improbability, lateness of expression and likely infirmity. For whatever reason, the testimony of this plaintiff shows a complete lack of concern for the truth.

The respect due the court during the trial of any case no matter how controversial makes the conduct of this trial an important matter of concern. Because the plaintiff's attorney recognized that indeed the great weight of the proof contradicted the basic claim of accident, this case was taken to the "streets" in what appears to be a civil variant of a criminal "political" trial.

Plaintiff's recovery can only be based on a finding of negligence of Wherrity and/or Schmidt in letting go of the line, or through unseaworthiness if, in fact, they acted deliberately. In the latter case proof of disposition not equal to their calling

would be required, and none was forthcoming. From the record it is clear that plaintiff failed to prove that the evidence preponderated in favor of negligence rather than an intentional act as explanation of the "accident." This may be a failure of proof entitling defendant to judgment n.o.v. This argument, at least, highlights the importance of permitting inquiry of plaintiff regarding his impression of the reason for his "accident," since a conclusive failure of proof might have been established in further cross-examination. This alone is basis for a new trial. Alternatively, the judgment of the district court should be reversed and a new trial ordered for the reasons stated above.

Respectfully submitted,

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JOSEPH T. STEARNS,
Of Counsel

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 7 day of Oct , 19 at No. 250 Broadway NYC deponent served the within Brief upon Fuchsberg + Fuchsberg the appellee herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the appellee therein.

Sworn to before me,
this 9 day of Oct 1975

Edward Bailey

William Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976